85-72

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAINE STATE TROOPERS ASSOCIATION
Appellant

v.

STATE OF MAINE and JAMES E. TIERNEY
Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE

MOTION TO AFFIRM OR DISMISS

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August 30, 1985

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Motion to Affirm or Dismiss

Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court of Maine sitting as the Law Court on the grounds that it is manifest that the questions on which the decision of this case depends are so unsubstantial as not to need further argument.

Questions Presented

I. Whether the Law Court correctly decided that the prohibition on solicitation by law enforcement officers and associations contained in the Solicitation by Law Enforcement Officers Act does not violate the rights of law enforcement officers under the First and Fourteenth Amendments of the United States Constitution.

II. Whether the Law Court correctly decided that Appellant was not entitled to recover attorneys' fees pursuant to 42 U.S.C. § 1988.

Statement of the Case

On October 25, 1983, the State of Maine filed a Complaint under the Solicitation by Law Enforcement Officers Act, 25 M.R.S.A. §§ 3701-3703 (Supp. 1984) (hereinafter referred to as the Act), and the Unfair Trade Practices Act, 5 M.R.S.A. §§ 206-214 (1979 & Supp. 1984)[1] against the Maine State Troopers Association (hereinafter referred to as MSTA) alleging violations of the Act. The Act prohibits any person from soliciting property from the general public when that property

[1] Pursuant to 25 M.R.S.A. § 3702 (Supp. 1984), a violation of the Act constitutes a violation of the Maine Unfair Trade Practices Act. Section 209 of the Unfair Trade Practices Act authorizes the Attorney General to seek injunctive relief against persons violating the Unfair Trade Practices Act.

will benefit, in any way, any law enforcement officer, law enforcement agency or law enforcement association. Specifically, the State alleged that the MSTA, an association consisting of troopers in the Maine State Police, sold advertising in a magazine published by the MSTA to members of the general public in violation of the Act.

The MSTA answered the Complaint denying that its sale of advertising violated the Act, requesting that the State's Complaint be dismissed on the grounds that the Act violated the First and Fourteenth Amendments of the United States Constitution and demanding attorneys' fees pursuant to 42 U.S.C. § 1988. The MSTA also filed a counterclaim alleging that the State's enforcement of the Act violated the rights of its members under the First and Fourteenth Amendments to the United States Constitution and seeking recovery of its legal fees pursuant to 42 U.S.C. § 1988. Subsequently, the MSTA added James E. Tierney, the Attorney General of the State of Maine, as a third party defendant to its Counterclaim.

After a hearing on a stipulated record, the Superior Court for Kennebec County issued a judgment holding that the Act constitutionally prohibited the solicitation of advertisements from the general public on behalf of law enforcement officers, agencies or associations. The Superior Court additionally ruled that the State could not impose greater restrictions on the distribution of publications and the sale of advertising than are imposed by the Act on state warden service associations. The Act creates a limited exception for the sale of advertising and the distribution of publications by state warden service associations. 25 M.R.S.A. § 3702 (Supp. 1984).[2] The Superior Court denied the MSTA's request for attorneys' fees pursuant to 42 U.S.C. § 1988. The MSTA appealed to the Law Court

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[2] The exceptions for state warden service associations, contained in 25 M.R.S.A. § 3702 (Supp. 1984) provides as follows:

> except that any state warden service association may offer for sale, by persons other than wardens or members of the association, to members of the public guide books or handbooks containing historical reviews

and the State of Maine filed a cross appeal with respect to the Superior Court's ruling barring the State from imposing greater restrictions on the MSTA than are imposed on publications issued by state warden service associations.

The Maine Supreme Judicial Court, sitting as the Law Court, affirmed the decision of the Superior Court. 491 A.2d 538 (Me. 1985). The Law Court concluded that, while the MSTA's solicitation activities were entitled to protection under the First Amendment, the Act was the least restrictive means of achieving the compelling governmental interest of prohibiting inherently coercive solicitations on behalf of law enforcement officers.

The Law Court affirmed the Superior Court's decision prohibiting the State from imposing any greater restrictions on the solicitation activities of law enforcement officers than are imposed upon state warden service associations, and, additionally, affirmed the Superior Court's denial of attorneys' fees to the Appellant pursuant to 42 U.S.C. § 1988. The Law Court concluded that the Association's affirmative defenses were adequate to protect the Association's civil rights and that "[t]he counterclaim added nothing, therefore we disregard it and view the MSTA as a defendant for purposes of this litigation." 491 A.2d 538, 544. Accordingly, under the rules set forth in *Hensley v. Eckerhart,* 461 U.S. 424, 429 n.2 (1983),

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or descriptions of services, except that on the request of a nonmember the association may provide that person with the copies requested for sale by that person. No advertisements may be sold or included in these publications, except greetings or complimentary statements from members or former members which shall give the full name of the member or former member. A stated rate for this advertisement space shall be published and no funds in excess of that stated rate may be accepted by the association for space. A record of receipts and sales for space and sales of the publication shall be kept and available to the public during normal working hours. All proceeds from these sales shall be expended for direct charitable services to members or their spouses, widows, children, widowers or parents and may not be used for buildings or equipment, construction or maintenance or entertainment of members.

the Law Court denied recovery of attorneys' fees because the record contained no substantial evidence that the State instituted its suit for purposes of harassment or vexation.

Argument

The questions presented in this appeal do not raise any novel issues under federal constitutional or statutory law. To the contrary, the Law Court's treatment of Appellant's claims under the First and Fourteenth Amendments follow the unambiguous decisions of this Court. Accordingly, this appeal raises questions so unsubstantial as not to warrant further argument either by way of brief or oral argument.

This Court has recently held that solicitation activities are protected by the First Amendment of the United States Constitution. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, ____ U.S. ____, 104 S. Ct. 2839, 2849 (1984); *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 623 (1980). This Court, however, has also unequivocally held that the First Amendment does not provide an absolute and total protection for speech. Rather, as articulated by the Court in *Village of Schaumburg*, a restriction on activities protected by the First Amendment will be justified if the restrictions serve a strong governmental interest and if that interest could not be served by restrictions "less destructive of First Amendment interests". 440 U.S. 620, at 636.

The Law Court's decision in upholding the constitutionality of the Solicitation by Law Enforcement Officers Act under the First and Fourteenth Amendments of the United States Constitution constitutes nothing more than an application of the clear principle set forth in *Village of Schaumburg*. The Law Court analyzed the legislative purpose supporting the Act and determined that the Maine Legislature sought to prohibit solicitations by law enforcement officers because such solicitations are "inherently coercive". As the Law Court concluded: "law enforcement solicitation erodes public confidence in the

integrity of law enforcement personnel. The State's interest in protecting the reputation of its law enforcement bodies is undeniably substantial. Indeed, we would be hard pressed to suggest a weightier interest." 491 A.2d 538, 542.

Additionally, the Law Court concluded that the Act constituted the least restrictive means with which to achieve its purpose: "Because at least the appearance of coercion inheres in every solicitation on behalf of law enforcement agents, and because that appearance undermines the integrity of the office, the State has a compelling interest in regulating *all* law enforcement solicitations." 491 A.2d 538, 542-43. (emphasis added).[3]

Similarly, Appellant's claim for attorneys' fees raises no substantial issue under federal law. The Law Court disregarded Appellant's counterclaim, concluding that "[t]he MSTA's affirmative defense was sufficient to protect their civil rights." 491 A.2d 538, 544. Accordingly, the Law Court followed this Court's decision in *Hensley v. Eckerhart, supra,* (holding that a prevailing defendant "may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant") in ruling on Defendant's claim for attorneys' fees under 42 U.S.C. § 1988. The Law Court concluded, based on its analysis of the record, that no substantial evidence existed to indicate that the State had brought this action "for purposes of harassment or vexation". 491 A.2d 538, 544. The Law Court's application of *Hensley* does not raise a substantial issue requiring further briefing or argument.

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[3] The Law Court rejected Appellant's arguments on overbreadth, vagueness and due process. The Law Court's treatment of these issues clearly follows accepted authority and raises no novel or substantial issues under federal law.

Conclusion

Wherefore, Appellees respectfully submit that the questions upon which this case depends are so unsubstantial as not to need further argument and Appellees respectfully move this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the case by the Supreme Judicial Court of Maine sitting as the Law Court.

Respectfully submitted,

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